

NEW MEXICO PUBLIC REGULATION COMMISSION

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September 8, 2009

The Honorable Julius Genachowski, Chairman
The Honorable Michael Copps
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The Honorable Mignon Clyburn
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The Honorable Marlene H. Dortch, Secretary
Federal Communications Commission
455 12th Street S.W.
Washington, D.C. 20554

**Re: Nebraska Public Service Commission and Kansas Corporation
Commission Petition for Declaratory Ruling or, in the Alternative, Adoption
of Rule Declaring that State Universal Service Funds May Assess Nomadic
VoIP Intrastate Revenues; WC Docket No. 06-122**

EX PARTE COMMENTS

Dear Commissioners and Secretary Dortch:

INTRODUCTION:

The New Mexico Public Regulation Commission, ["NMPRC"], hereby submits its comments in support of the Petition of Nebraska Public Service Commission for Declaratory Ruling or, in the Alternative, Adoption of Rule Declaring That State Universal Service Funds May Assess Nomadic VoIP Intrastate Revenues ["the Petition"]. The

NMPRC believes that only prompt action by the Federal Communication Commission ["FCC"] will protect the integrity of state universal service funds in New Mexico and other states, end uncertainty and litigation in multiple jurisdictions, and ensure that telecommunications companies that provide Plain Old Telephone Services ["POTS"] are not forced to unfairly subsidize carriers using Voice over Internet Protocol (VoIP) technology. Further, swift action by the FCC is necessary because some providers of intrastate VoIP in New Mexico have been contributing to the State USF while other providers of intrastate VoIP have been unwilling to contribute.

Refusal to report and contribute by Vonage Holding Corp., Vonage America Inc and Vonage Network Inc. ["Vonage"] has already cost the State both in terms of lost USF revenues and legal fees incurred in trying to enforce the law. In June 2008, the NMPRC brought a declaratory relief action in the Federal District Court for the District of New Mexico to enforce New Mexico USF contribution laws. [New Mexico Public Regulation Commission v. Vonage Holding Corp., Vonage America Inc. and Vonage Network, Inc., Case No. 08-CV-00607 WJ/RHS, a copy is attached as Attachment A for the FCC's convenience]. Vonage filed a Motion to Dismiss on the grounds of federal preemption. On July 28, 2009 the Federal District Court dismissed the NMPRC's case with prejudice. In doing so, the New Mexico Federal District Court relied heavily on the decision of the Eight Circuit Court of Appeals in the Nebraska actions Vonage Holdings Corp. v. Nebraska Public Service Commission, 564 F.3d 900 (8th Cir. 2009) ["the Nebraska Public Service Commission case"], the decision of the same court in the action Vonage Holdings Corp. v. Minn. Public Utilities Commission, 290 F. Supp. 2d 993 (D. Minn. 2003). *Aff'd*, 394 F.3d 568 (8th Cir. 2004) and on the FCC's order in In re Vonage Holdings Corp. Petition for Declaratory Ruling Concerning Order of the Minn. Pub. Util. Comm'n, 19 F.C.C. Red. at 22,410 ["the Vonage Preemption Order"]. Significantly, the New Mexico District Court indicated that the relief sought by New Mexico could only come from the FCC.

While the NMPRC believes the reliance on the Vonage Preemption Order and the Eight Circuit Court decisions is misplaced, it is clear that the most effective avenue to resolve this dispute is through action of the FCC as set forth in the Petition.

Within three days of entry of the Judgment against the NMPRC, Vonage submitted *Ex Parte* Comments to the FCC in which it told the FCC that Vonage does **not** object to contributing to state USF.¹

Vonage, and presumably other VoIP providers, contend that before they contribute

¹ See Letter of August 7, 2009 from Wiltshire and Grannis, LLP [counsel for Vonage Holding Corp.] to Marlene Dortch, Secretary, FCC regarding *Ex Parte* meeting of August 6, 2009.

to state USF, the FCC must undertake a full blown rulemaking proceeding to determine whether and under what circumstances VoIP providers must comply with state USF laws and regulations. Such an approach is unnecessary² and the resultant delay in consistent compliance with state USF requirements will have a negative impact both on the New Mexico USF and on competitive neutrality.

At this time, there is uncertainty among contributing New Mexico VoIP providers as to whether they will continue to contribute,³ and whether action by the FCC will require non-contributing providers to contribute retroactively after the FCC acts. As a result, the New Mexico USF faces the specter of potential loss of revenues, increases in the surcharge rates for contributing providers and unintended competitive advantages to VoIP providers who refuse to contribute to the USF.

For the foregoing reasons, the NMPRC joins Petitioners and the National Association of Regulatory Utility Commissioners in urging an **expeditious** declaration by the FCC that state USF assessment of intrastate nomadic VoIP revenue is not preempted.

BACKGROUND:

For more than 10 years, it has been both the public policy and the law of the State of New Mexico to ensure access to telecommunication services at affordable rates (1978 NMSA §63-9A-2) throughout the state, including the vast rural areas and low income areas. The New Mexico Rural Telecommunications Act ["the Act"] (1978 NMSA §§63-9H-1 *et. seq.*), established the state Rural Universal Service Fund ["USF"] which funds this effort.

In New Mexico, the USF serves as a "specific, predictable and sufficient support mechanism ... that reduces implicit subsidies, including access charges and ensures universal service in the state." (1978 NMSA §63-9H-6(C).) The statute and implementing regulations recognize that "to the extent that it is consistent with maintaining availability of access to service at affordable rates for rural customers, it is further the policy of this state to encourage competition and reduce regulation in the telecommunications industry, thereby allowing access by the public to resulting rapid advances in telecommunications technology." (1978 NMSA §63-9H-2). Under § 63-9H-3(N) of the Act, "public telecommunications services" are defined to include "the transmission of signs, signals,

² The NMPRC joins in the Petitioners' August 17, 2009 response to Vonage's August 7, 2009 *Ex Parte* Comments.

³ As of August 2009, New Mexico's USF plan administrator, Solix, Inc. reported that a dozen providers of intrastate VoIP in New Mexico were complying with state law and reported intrastate VoIP revenues have been increasing over the past three years.

writings, images, sounds messages, data or other information of any nature by wire, radio, lightwaves or other electromagnetic means originating and terminating in this state regardless of actual call routing", subject to certain exceptions not relevant to this matter. Thus, the USF may be used to improve access to advanced telecommunications and to information services (17.11.10.27 NMAC.⁴)

While the goal of affordable universal service is hardly unique, it is a particular challenge in a state which is the fifth largest in area in the country and sixth lowest in population density⁵. The USF is specifically dedicated to this purpose. The NMPRC is tasked with implementation of rules to affect this policy. (1978 NMSA §63-9H-6(D).)

To that end, in 2005 the New Mexico State legislature amended the Act to require the NMPRC to issue regulations consistent with the goals of the statute. The NMPRC adopted regulations requiring that all "entities that provide intrastate retail public telecommunication services or **comparable retail alternative services**," [emphasis added] expressly including VoIP providers are required to contribute to the state USF. (17.11.10.20.(D) and (F) NMAC and 17.11.10.7.(G) and (O) NMAC). Effective April 1, 2006 all providers were to begin reporting and paying into the USF a portion of total retail revenues attributable to intrastate retail communications. (17.11.10.20 NMAC).

In August, 2006, the NMPRC called for comments on the appropriate method of determining VoIP providers' contributions to the New Mexico USF. (NMPRC Case No. 06-00026-UT).

Only five sets of written comments were received by the NMPRC – and notably Vonage did not offer any written or oral comments. Of those comments received, only one entity – Level 3 Communications – "wholesale providers of communications services to bandwidth intensive customers and Internet Protocol based resellers" [See, Comments of Level 3 Communications, LLC at p.1] – took the position that the FCC had preempted state commissions from imposing state USF surcharges on intrastate calls. The

⁴ A complete copy of New Mexico Title 17, Chapter 11, Part 10, Public Utilities and Utility Services, (Telecommunications State Rural Universal Service Fund regulations are attached to these Comments as Attachment B.)

⁵ To appreciate the vast spaces involved in bringing universal service to the four corners of New Mexico, consider that the population density of Washington D.C. is 9316.4 people per square mile, the population density of Maryland with its large suburban areas is 541.9 people per square mile and Virginia, with its rolling countryside and farms is 178.8 people per square mile. In stark contrast, the population density of New Mexico is only 15 people per square mile – or – if spread evenly across the state every man, woman and child would have nearly 43 acres to themselves. (U.S. Census Bureau, Census 2000 Summary File 1 and calculations based on that data; copy attached as Attachment C.)

comments from Qwest Corporation [the largest provider of wireline services in New Mexico and a provider of VoIP in New Mexico], Mescalero Apache Telecom, Inc., the New Mexico Exchange Carriers Group and the Telecommunications Regulatory Commission of the Navajo Nation did not assert that the state was preempted from imposing the USF surcharge on the intrastate call revenues of VoIP providers. Rather, their comments addressed the mechanics of contribution.

Following hearings, the NMPRC issued an Order in In the Matter of Implementation of State Rural Universal Service Fund, Order On Methods of Determining VoIP Provider' Contribution to State Universal Service Fund, Case No. 06-00029-UT, ("NMPRC USF Order"). The NMPRC USF Order amended the then current regulations and permitted VoIP providers to determine intrastate revenue for purposes of the USF surcharge using the same methods approved by the FCC in its order In the Matter of Universal Service Contribution Methodology, (FCC 06-94 issued June 21, 2006 ["USF Contribution Order"]) for the federal USF, including a safe harbor percentage, actual revenue allocation between interstate and intrastate calls or traffic studies.⁶

In the nearly three years since these regulations were implemented, the number of New Mexico VoIP providers that have complied with state law, reported revenues and paid into the state USF have increased from five to a high of fourteen. However, many more New Mexico VoIP providers have simply ignored state law or provided notice to the third party fund administrator that they contend that the NMPRC lacks authority to require VoIP providers to contribute to the USF.⁷

Vonage is an example of an entity which historically has refused to report or contribute to the USF. Although the decision of the Federal District Court for the District of New Mexico does not expressly invalidate the provisions of state law requiring contribution by VoIP providers to the USF, the NMPRC has already received an inquiry from a national accounting and regulatory compliance firm asking whether VoIP providers who have been contributing to the USF are "now exempt" from the USF⁸. At this time, NMPRC must address the issue promptly to give guidance to all USF contributors. Therefore the

⁶ Notably, the NMPRC has not attempted to regulate or impose entry requirements on VoIP carriers.

⁷ Solix has reported that 5 VoIP providers notified them that they believed that the NMPRC lacked authority to require contribution to the state USF and 50 providers simply failed to respond in any way to Solix's communications attempting to enforce the New Mexico USF requirements. In 2008, Solix reported that as many as fourteen providers reported VoIP revenue. According to Solix, only twelve providers were reporting VoIP revenue and contributing to the USF for such revenues in 2009.

⁸ See, Email from D. Edelson of "CCH, a Wolters Kluwer business" to K. Smith of NMPRC dated August 2, 2009 attached hereto as Attachment D.

NMPRC looks to the FCC for swift action on the Petition.

At present, NMPRC is uncertain whether the VoIP providers who have been contributing to the USF will continue to do so. Further, NMPRC has no reasonable basis to expect the dozens of other providers who have not been making the required reports and payments to begin reporting until the FCC acts.

It is now agreed in principle – by some states and by some VoIP providers – that VoIP carriers should contribute proportionally to state funds. Yet the net effect of the current regulatory uncertainty is that these VoIP providers are empowered to avoid paying their fair share into these funds. At a time when the VoIP industry is rapidly capturing market share from the traditional carriers who have been the backbone of universal service funding, the financial impacts are unfair and unsustainable. Until the FCC unequivocally declares, that which it has stated in its Amicus Brief to the Eight Circuit Court of Appeals, in the Nebraska action⁹ that the states are not preempted from assessing universal service charges on the intrastate revenues of providers of nomadic VoIP service, the NMPRC and other Commissions throughout the country will face a loss of USF revenues!

The current regulatory uncertainty has also created an unintended competitive inequality. VoIP providers who do not contribute to the USF have created an unfair competitive advantage for themselves over telecommunications providers that abide by state law. This is precisely the result with the FCC sought to avoid when it adopted its USF Contribution Order.

The FCC noted that requiring interstate VoIP providers to contribute to the federal USF, promotes the principle of competitive neutrality by “reduc[ing] the possibility that carriers with universal service obligations will compete directly with providers without such obligations.” (USF Contribution Order ¶¶ 43 and 44). The same argument holds true for contribution to state USF. Those VoIP providers who ignore state law are at an advantage both as to other VoIP providers and as to providers of wireline and wireless service who contribute to the USF.

Another fallout to the citizens of New Mexico, from the current regulatory uncertainty, is the direct and indirect costs to consumers. In New Mexico, the USF contribution of each provider is a function of intrastate retail revenues times a surcharge rate. (17.11.10.20(D) NMAC). The surcharge rate is a function of the sum of all reported intrastate retail telecommunications revenues for all contributing carriers. (17.11.10.20(C))

⁹ See, Brief for Amici Curiae United States and Federal Communications Commission Supporting Appellants’ Request for Reversal, [“FCC Brief”] filed in the Nebraska Public Service Commission case.

NMAC.) Thus, the fewer contributors to the USF and the smaller the revenues reported, the higher the surcharge rate will be in order to meet annual fund requirements. (17.11.10.19 NMAC). That contribution is paid in the first instance by the customers of contributing providers. Thus, what the consumers will have to pay will go up. As costs to consumers go up, it is reasonable to expect that some customers with access to high speed internet services will have a greater incentive to cancel POTS from contributing providers and subscribe to VoIP services provided by Vonage and others. In turn, as more customers move away from POTS, the USF fees will be spread over a smaller and smaller customer base and the cycle will feed upon itself.¹⁰

The continuing regulatory uncertainty, competitive inequities and ongoing harm to the state and federal goals of universal service and enhanced access is unnecessary. The argument that only the FCC has authority to require USF contributions from VoIP providers reads too much into the Vonage Preemption Order and ignores the authority granted states by federal statute.

It is undisputed that states have authority under 47 U.S.C. § 254(c) and (f) to impose USF contribution requirements on intrastate revenue generated by telecommunication service providers. The Tenth Circuit has characterized the federal and state USF authority as a "partnership between the federal and state governments to support universal service Qwest Corporation v. Federal Communications Commission, 258 F.3d 1191, 1203 (10th Cir. 2001), citing § 254(b)(5). These characteristics -- origination in federal legislation and partnership with the federal USF -- distinguish the state USF from the regulatory conduct addressed by the FCC in the Vonage Preemption Order. In the conclusion of the Vonage Preemption Order, FCC states, "For the reasons set forth above, we preempt the Minnesota Vonage Order. As a result, the Minnesota Commission may not require Vonage to comply with the *certification, tariffing, or other related requirements as conditions to offering DigitalVoice* in that state." 19 FCC Rcd 22432 ¶ 46 (emphasis added). This language, which constitutes the FCC's ultimate holding, clearly limits the scope of preemption to Minnesota's "traditional telephone company" regulations which also imposed conditions of entry for Vonage's service. Thus, in contrast to the situation in which a state tried to fully regulate a VoIP provider's entry into the market, the decision to require nomadic VoIP providers to contribute to state USF "does not frustrate federal policy objectives, but, in fact, promotes them." [See, Brief for Amici Curiae United States

¹⁰ Again, it is somewhat ironic that some providers of VoIP services derive a substantial portion of their income from calls made from VoIP service to traditional land line service. Therefore universal access to POTS benefits VoIP providers. Indeed the FCC states that "much of the appeal of [VoIP] services to consumers derives from the ability to place calls to and receive calls from the PSTN]" (See FCC Brief at p. 15, citing to VoIP USF Order, 21 FCC Rcd at 7540-41 ¶43.)

and Federal Communications Commission Supporting Appellants' Request for Reversal at p, 15, filed in the Nebraska Public Service Commission case].

Finally, the issue of VoIP providers being double assessed due to differences in state rules for determining intrastate revenues is not a reason to put the ability of states to require USF contributions "on hold". The customers and revenues affected by variation in state definitions are a tiny fraction of the total -- if any. The NMPRC's need for clear authority to collect USF contributions from VoIP carriers on the same basis as from other telephone providers dwarfs our concerns that one method of splitting customers with a presence in multiple states might be superior to another. The NMPRC joins in the arguments of the Petitioners and NARUC in urging the FCC to swiftly act to protect universal service and to bring to an end the unfair advantage enjoyed by **some** nomadic VoIP providers.

The submission of the comments presented herein was supported by NMPRC Commissioners Jones, Marks, Block, Sloan and myself. I am submitting these comments on behalf of myself and my colleagues.

Very truly yours,



David W. King, Vice-Chairman

ATTACHMENT A

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

NEW MEXICO PUBLIC REGULATION
COMMISSION,

Plaintiff,

vs.

Case No. CIV-08 _____

VONAGE HOLDINGS CORP., VONAGE AMERICA
INC. and VONAGE NETWORK INC.,

Defendants.

COMPLAINT FOR DECLARATORY JUDGMENT

COMES NOW Plaintiff New Mexico Public Regulation Commission, by and through its attorneys, Felker, Ish, Ritchie & Geer, P.A. (Randolph B. Felker and Carol J. Ritchie) and the Office of the General Counsel for the New Mexico Public Regulation Commission (Allen R. Ferguson, Jr.), and for its Complaint for Declaratory Judgment states and alleges as follows:

Jurisdictional Statement

1. The nature of this suit is Plaintiff's claim for declaratory judgment. Federal questions are presented by the dispute between the parties. Accordingly, this is a civil action of which the United States district courts have original jurisdiction pursuant to 28 U.S.C. Section 1331.

2. Defendants provide their services to many New Mexico customers. Defendants advertise and promote their services in media designed by Defendants to recruit New Mexico residents as their paying customers. Defendants earn substantial revenues from their New Mexico customers. Defendants have substantial contacts with New Mexico.

3. This Court has personal jurisdiction over Defendants.

4. Venue is proper in this district under 28 U.S.C. Section 1391(b) because Plaintiff is a New Mexico governmental entity and the events and activities giving rise to this suit arose in New Mexico.

5. This Court has jurisdiction over the subject matter of this suit.

Declaratory Judgment

6. Plaintiff brings this declaratory judgment action pursuant to 28 U.S.C. Section 2201.

7. Pursuant to New Mexico law, the New Mexico Public Regulation Commission (hereinafter "Public Regulation Commission") has established a "state rural universal service fund" (hereinafter "Universal Service Fund") to maintain and support public telecommunications services in throughout New Mexico at affordable rates, including by reducing intrastate toll rates.

8. Vonage Holdings Corp. and/or Vonage America Inc. and/or Vonage Network Inc. (hereinafter "Vonage") provide intrastate retail public telecommunications services to New Mexico customers.

9. The Public Regulation Commission claims Vonage is subject to the Public Regulation Commission's surcharge on Vonage's New Mexico intrastate retail public telecommunications services, which surcharge is to be utilized (with other telecommunications carriers' surcharges) to fund the Universal Service Fund.

10. On information, Vonage claims that it is not providing telecommunications services or is not providing intrastate telecommunications services. On information, Vonage also claims that the Public Regulation Commission's authority to impose a surcharge on Vonage's New Mexico intrastate services has been preempted by application of federal law. On

information, Vonage also claims that its intrastate VoIP traffic and revenues cannot be determined, or are impossible to determine as a practical matter, and that the Public Regulation Commission cannot lawfully impose surcharges on its intrastate services or revenues.

11. On March 31, 2006, legal counsel for Vonage America Inc. notified the Public Regulation Commission that Vonage is not subject to New Mexico's universal service reporting and contribution requirements.

12. By reason of the conflicting claims of the parties, an actual case and controversy exists relative to the respective rights and duties of the parties, more particularly as to the Public Regulation Commission's authority to impose a surcharge for the purpose of supporting the Universal Service Fund on Vonage's intrastate VoIP services and revenues. Declaratory judgment will resolve the dispute among the parties and will resolve the controversy presented.

13. The Public Regulation Commission does not herein seek to license, permit, approve rates of, set standards for, or otherwise regulate Defendants or other similar carriers, only to impose its surcharge for the Universal Service Fund.

Facts

14. The New Mexico Public Regulation Commission was created in Article XI, Sections 1 and 2 of the Constitution of New Mexico. Article XI, Section 2 of the Constitution grants the Public Regulation Commission, among other powers, the power to regulate transmission companies, including telephone, telegraph and information transmission companies. The general powers and duties of the Public Regulation Commission are further set forth in NMSA 1978 Section 8-8-4, and in other New Mexico statutes. Among the duties and powers of the Public Regulation Commission are to administer and enforce the laws with which it

is charged, including administration of the New Mexico Telecommunications Act, NMSA 1978 Section 63-9A-1, *et seq.* and the New Mexico Rural Telecommunications Act, NMSA 1978 Section 63-9H-1, *et seq.*

15. The New Mexico Public Regulation Commission has the power to sue and to be sued and may retain legal counsel to represent it and to advise it.

16. This civil action has been duly authorized by the vote of the commissioners who compose the Public Regulation Commission.

17. Vonage America Inc. is a Delaware corporation.

18. Vonage America Inc. has sought and received from the Public Regulation Commission the right to do business in New Mexico.

19. Vonage America Inc. is doing business in New Mexico providing telecommunications services to New Mexico residents.

20. Vonage Holdings Corp. is a Delaware corporation.

21. Vonage Network Inc. is a Delaware corporation.

22. On information, Vonage Holdings Corp. is the owner and controller of related companies utilizing the name and brand "Vonage", including Vonage America Inc. and Vonage Network Inc.

23. In their filings and promotional materials, Vonage Holdings Corp., Vonage America Inc. and Vonage Network Inc. do not clearly distinguish the differences between the various Vonage entities.

24. Vonage holds itself out to the general public through advertising and other promotional materials as providing "voice", "telephone" and "phone" interstate, international, local and intrastate telecommunications services. Vonage promotes its services as being in the

nature of "voice" and "phone" service through advertisements intentionally directed to New Mexico residents and customers. Vonage expressly promotes its services as being for local and intrastate calls, as well as for long distance and international calls.

25. In various forums, but not to its customers and potential customers, Vonage refers to its services as being "data" transmission services rather than voice transmission, phone or telephone services.

26. In its advertisements and promotional materials, Vonage touts its service as being voice and phone service. In its advertisements and promotional materials, Vonage presents its services as being equivalent to those offered by traditional wireline telephone providers and/or wireless telecommunications providers, but differentiates its services from those of its competitors by various features Vonage offers and low rates.

27. Vonage provides intrastate retail telecommunications services in New Mexico to New Mexico residents and to persons and firms located in New Mexico. Vonage's telecommunications services provided to New Mexico customers include intrastate communications services.

28. Telecommunications services provided by Vonage are known as Voice over Internet Protocol or "VoIP" which allows internet users with high-speed connections to communicate by voice over the internet. A substantial portion of those telecommunications VoIP services which Vonage provides are of an intrastate nature, originating in New Mexico and terminating in New Mexico. The VoIP services which Vonage provides to New Mexico users is comparable to and is competitive with wireline telecommunications services, cellular telecommunications services and VoIP services provided by companies with coaxial/television cable services.

29. VoIP services provided by Vonage to customers in New Mexico and in other states are interconnected with the public switched telephone network ("PSTN"), which allows a call placed from a Vonage phone to connect to a wireline phone that is part of the PSTN or to a wireless (cellular) phone that is also interconnected with the PSTN. Vonage's interconnection with the PSTN also permits calls placed from a wireline or wireless phone to be placed to a Vonage VoIP phone. Without PSTN interconnection, Vonage would be unable to provide the VoIP services that it provides to New Mexico customers. Vonage utilizes local New Mexico PSTN connections to serve its New Mexico customers.

30. The Federal Communication Commission (hereinafter "FCC") is a federal agency charged with regulating interstate and foreign commerce in communication by wire and radio. 47 U.S.C. § 151.

31. The Telecommunications Act of 1996, 47 U.S.C. § 251, *et seq.* (hereinafter "Telecommunications Act") continues the dual system of state and federal regulation of telecommunications. 47 U.S.C. § 254(c).

32. The FCC imposes a surcharge on VoIP carriers' interstate revenues to finance the federal universal service fund.

33. The FCC has adopted a "safe harbor" method of approximating international and interstate VoIP traffic as distinguished from intrastate traffic. The FCC's formula is reasonable. In adopting the "safe harbor," the FCC implicitly determined that intrastate VoIP traffic could be reasonably estimated as the inverse of the FCC's determination of international and interstate VoIP traffic (deducting the federal percentage of 64.9% from 100%).

34. The Telecommunications Act calls for the creation of a Federal-State Joint Board

to assist in implementing the universal service principles expressed in the Act and expressly authorizes the various states to "adopt regulations not inconsistent with the [FCC's] rules to preserve and advance universal service." 47 U.S.C. §§ 254(a) and 254(f). In doing so, Congress recognized limited state jurisdiction over telecommunications carriers including VoIP providers to the extent that states may require VoIP providers to contribute to the various state universal service funds.

35. Neither Congress nor the FCC has preempted the individual states' jurisdiction to require VoIP providers contribute to the various states' universal service funds.

36. In the New Mexico Telecommunications Act at NMSA Section 63-9A-2, the New Mexico legislature declared that it is the policy of the state of New Mexico to maintain the availability of access to telecommunications services at affordable rates. The New Mexico Telecommunications Act, at NMSA Section 63-9A-3.M, defines the term "public telecommunications service" as "the transmission of signs, signals, writings, images, *sounds*, messages, *data or other information of any nature* by wire, radio, lightwaves or other electromagnetic means originating within and terminating in this state regardless of actual call routing . . . ". [emphasis added].

37. The New Mexico Rural Telecommunications Act, NMSA 1978, Section 63-9H-1, *et seq.* established the Universal Service Fund for the purpose of maintaining and supporting telecommunications services within the state of New Mexico at affordable rates and reducing intrastate toll charges.

38. Per NMSA 1978 Section 63-9H-6.B, the Public Regulation Commission "has authority to apply the surcharge on intrastate retail public telecommunications services provided by the telecommunications carriers and to comparable retail alternative services provided by

telecommunications carriers, including commercial mobile radio services, at a competitively and technologically neutral rate or rates to be determined by the Public Regulation Commission."

39. Per NMSA 1978 Section 63-9H-6B, the Universal Service Fund is financed by a surcharge on intrastate retail public telecommunication services.

40. For the purpose of funding the Universal Service Fund, the Public Regulation Commission has the authority to apply the surcharge on intrastate retail public telecommunications services provided by conventional telecommunications carriers and to comparable retail alternative services provided by telecommunications carriers.

41. The Public Regulation Commission promulgated its Rule 17.11.10 NMAC, which requires carriers that provide intrastate retail telecommunications services or comparable alternative services in New Mexico, expressly including VoIP providers, to contribute to the Universal Service Fund on a monthly basis. All such providers must also submit reports to the Public Regulation Commission.

42. The Public Regulation Commission has established criteria for participation in the Universal Service Fund consistent with federal law to insure the availability of service in New Mexico at affordable rates.

43. VoIP providers, like wireline and wireless providers of services, are subject to the state requirement that they contribute to the Universal Service Fund with respect to intrastate revenues earned, beginning April 1, 2006. The Public Regulation Commission has adopted rules imposing a 3.32% surcharge on intrastate retail public telecommunications service for the year 2006 and a 3.0% surcharge on intrastate retail public telecommunications service revenues for the years 2007 and 2008 for the Universal Service Fund. The Universal

Service Fund surcharges are imposed on a competitively neutral basis to all providers of intrastate retail public telecommunications services.

44. On October 5, 2006, in Case No. 06-00026-UT, the Public Regulation Commission issued its order entitled "ORDER ON METHODS OF DETERMINING VoIP PROVIDERS' CONTRIBUTIONS TO STATE UNIVERSAL FUND" (hereinafter "Order"). In adopting its Order, the Public Regulation Commission noted that the FCC has required VoIP providers to contribute to the federal universal service fund, and that the FCC had established a "safe harbor" that VoIP providers could use to estimate the percentage of their telecommunications revenues that constitute revenues from interstate, as opposed to intrastate, calls, and that the interstate revenue "safe harbor" was set at 64.9% by the FCC.

45. Prior to adopting its Order, the Public Regulations Commission provided notice of hearing and opportunity to submit written or oral comments regarding the appropriate method of determining VoIP providers' contributions to the Universal Service Fund.

46. The Order was adopted after a public hearing was held and after due and proper public notice had been made.

47. Vonage did not appear at the hearing and did not submit comments or otherwise contest the authority of the Public Regulation Commission to adopt an order regarding the appropriate method of determining VoIP providers' contributions to the Universal Service Fund.

48. In the Order, the Public Regulations Commission determined:

- a. The Public Regulations Commission had jurisdiction and authority to require providers of VoIP services to contribute to the Universal Service Fund;
- b. VoIP services such as those provided by Vonage are subject to the PRC's

Universal Service Fund contribution requirements;

c. VoIP providers may report intrastate revenues based on: (1) the FCC "safe harbor" formula for estimating intrastate revenues by deducting the federal percentage (64.9%) from 100%; (2) by actual revenue allocations; or (3) a traffic study. VoIP providers may choose among the same three methods for determining required contributions to the Universal Service Fund that the FCC has found appropriate for determining VoIP providers' contributions to the federal universal service fund.

49. Vonage has failed or refused to pay and continues to refuse to pay the Public Regulation Commission's Universal Service Fund surcharges.

50. Vonage has failed or refused to submit any reports to the Public Regulation Commission detailing its intrastate traffic or revenues.

51. On information, all or almost all wireline and wireless telecommunications companies providing intrastate telecommunications services to New Mexico users pay the applicable surcharge into New Mexico's Universal Service Fund. Typically, those companies providing such telecommunications services pass along the Universal Service Fund surcharge to their customers as an additional charge to those customers. Vonage's refusal and failure to pay Universal Service Fund surcharges therefore results in a competitive advantage to Vonage over those other telecommunications providers, including those VoIP providers which contribute to the Universal Service Fund and pass those charges along to their customers.

52. Telecommunications carriers providing services to New Mexico residents are subject to New Mexico's "standard" gross receipts tax imposed by NMSA 1978 Section 7-9-1, *et seq.* and/or New Mexico's interstate telecommunications gross receipts tax imposed by NMSA 1978 Section 7-9C-1, *et seq.* On information, Vonage pays or may pay those gross receipts taxes

and possesses a reliable methodology for quantifying its intrastate and interstate services provided to New Mexico customers.

53. On information, Vonage possesses a traffic study or traffic studies which show the percentage of calls made by Vonage's customers which are of intrastate nature.

54. On information, by utilizing the internet protocol ("IP") addresses involved, it is possible for Vonage to determine, with reasonable accuracy, the approximate physical locations of Vonage's customers who originate intrastate VoIP communications.

55. On information, it is possible, with reasonable accuracy, for Vonage to determine the approximate physical location of recipients of VoIP communications by utilizing the IP addresses or the area codes and phone numbers involved.

56. On information, Vonage has the same ability to determine the geographical termination points (points where calls are received) for calls placed from a Vonage VoIP phone as wireline and interconnected wireless telecommunications carriers have to determine the geographical termination points (points where calls are received) of calls placed from their phones.

57. On information, Vonage has the technical capability to determine, with reasonable accuracy, which specific communications utilizing Vonage's VoIP services are of an intrastate nature. Alternatively, if Vonage claims that its record keeping or its technology is incapable of providing a breakdown of its intrastate calls, use of traffic studies or the safe harbor formula adopted by the FCC and the Public Regulation Commission can reasonably be used to determine Vonage's intrastate services.

58. On information, Vonage does not charge different rates for its intrastate versus its interstate VoIP services. Its intrastate revenues can be determined by measuring the

percentage of its intrastate calls compared to its other calls.


59. On information, it is possible to quantify Vonage's intrastate versus interstate VoIP services.

WHEREFORE, Plaintiff requests declaratory judgment as follows:

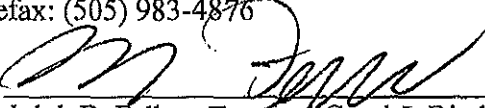
- A. Declaring that intrastate VoIP telecommunications services provided by Vonage are subject to the Public Regulation Commission's surcharge for the Universal Service Fund;
- B. Declaring that the Public Regulation Commission's authority to require Vonage and similarly situated VoIP carriers to contribute to the Universal Service Fund a percentage of their interstate telecommunications revenues, on the same basis as other telecommunications carriers are required to do, is not preempted by federal law;
- C. Requiring Vonage to elect among authorized and available methodologies the manner by which its intrastate revenues will be determined; alternatively requiring Vonage to reasonably quantify its intrastate traffic and revenues so that the Public Regulation Commission's surcharge on Vonage for the Universal Service Fund can be determined;
- D. Requiring Vonage to contribute to the Universal Service Fund on a monthly basis and to submit required reports to the Public Regulation Commission;
- E. If Vonage claims it cannot quantify its intrastate traffic or revenues, requiring Vonage to implement reasonably available technology to do so;
- F. For an award of costs of suit; and
- G. For such other and further relief as the Court deems equitable in the premises.

Respectfully submitted:

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State of New Mexico
Public Regulation Commission
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Counsel for Plaintiffs

Subj: Activity in Case 6:08-cv-00607 New Mexico Public Regulation Commission v. Vonage Holdings Corp., Vonage America Inc., and Vonage Network, Inc. Complaint
Date: 6/27/2008 10:41:35 AM Mountain Daylight Time
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To: cmecfto@nmcourt.fed.us

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U.S. District Court

District of New Mexico - Version 3.2.1

Notice of Electronic Filing

The following transaction was entered by Felker, Randolph on 6/27/2008 at 10:40 AM MDT and filed on 6/27/2008

Case Name: New Mexico Public Regulation Commission v. Vonage Holdings Corp.,
Vonage America Inc., and Vonage Network, Inc.
Case Number: 6:08-cv-607
Filer: New Mexico Public Regulation Commission
Document Number: 1

Docket Text:

COMPLAINT for Declaratory Judgment against all defendants (Filing Fee - Deliver Payment), filed by New Mexico Public Regulation Commission.(Felker, Randolph)

6:08-cv-607 Notice has been electronically mailed to:

Randolph B. Felker randfelker@aol.com

Allen R Ferguson , Jr allen.ferguson@state.nm.us

Carol Jean Ritchie cjish@hotmail.com

6:08-cv-607 Notice has been delivered by other means to:

The following document(s) are associated with this transaction:

Document description:Main Document

Original filename:n/a

Electronic document Stamp:

[STAMP dcecfStamp_ID=1167529506 [Date=6/27/2008] [FileNumber=1683490-0]
] [39f5ef2b699dd445fcb35d8b5dc889a11412d6bbe814b17be26e3ad35fce2a21a9f
114ad7c1b8684575f029b9019cd1f835ece73214c8178b591ffb03a38777f]]

ATTACHMENT B

TITLE 17 PUBLIC UTILITIES AND UTILITY SERVICES
CHAPTER 11 TELECOMMUNICATIONS
PART 10 STATE RURAL UNIVERSAL SERVICE FUND

17.11.10.1 ISSUING AGENCY: New Mexico Public Regulation Commission, Utility Division.
[17.11.10.1 NMAC - Rp, 17 NMAC 13.10.1, 11/30/05]

17.11.10.2 SCOPE: This rule applies to all entities that provide intrastate retail public telecommunication services and comparable retail alternative services in New Mexico.
[17.11.10.2 NMAC - Rp, 17 NMAC 13.10.2, 11/30/05]

17.11.10.3 STATUTORY AUTHORITY: Sections 8-8-4 and 63-9H-6 NMSA 1978.
[17.11.10.3 NMAC - Rp, 17 NMAC 13.10.3, 11/30/05]

17.11.10.4 DURATION: Permanent.
[17.11.10.4 NMAC - Rp, 17 NMAC 13.10.4, 11/30/05]

17.11.10.5 EFFECTIVE DATE: November 30, 2005, except where a later date is cited within a section.
[17.11.10.5 NMAC - Rp, 17 NMAC 13.10.5, 11/30/05]

17.11.10.6 OBJECTIVE: The purpose of this rule is to provide procedures for administering and implementing the New Mexico state rural universal service fund (fund), including the implementation of a specific, predictable and sufficient support mechanism that reduces intrastate switched access charges to interstate switched access charge levels in a revenue-neutral manner and ensures universal service in the state.
[17.11.10.6 NMAC - Rp, 17 NMAC 13.10.6, 11/30/05]

17.11.10.7 DEFINITIONS: In addition to the definitions contained in Section 63-9H-3 NMSA 1978, as used in this rule:

A. "access line" means the connection of the end-user customer to the public switched network, and is not limited to wireline or any other technology;

B. "administrator" means the person designated by the commission to administer the fund;

C. "basic local exchange rate" means an incumbent local exchange carrier's tariffed, monthly, flat single-line rate charged to its retail customers for the provision of local exchange service;

D. "carrier" means an entity that provides intrastate retail public telecommunications services or comparable retail alternative services in New Mexico;

E. "commercial mobile radio service (CMRS)" means a designation by the federal communications commission for any carrier or licensee whose wireless network is connected to the public switched telephone network or is operated for profit;

F. "commission" means the New Mexico public regulation commission;

G. "contributing company" means any carrier that provides intrastate retail public telecommunications services or comparable retail alternative services in New Mexico;

H. "eligible telecommunications carrier (ETC)" means an entity with New Mexico operations that provides retail telecommunications services that has been designated by the commission as eligible to receive disbursements from the fund or from the federal universal service fund;

I. "exempt customer" means an end-user of telecommunications service that is the state of New Mexico, a county, a municipality or other governmental entity; a public school district; a public institution of higher education; an Indian nation, tribe, or pueblo; a private telecommunications network; or a person eligible to receive reduced rates under a low-income telephone assistance plan created by the federal government or the state of New Mexico;

J. "fund" means the state of New Mexico universal service fund established pursuant to, Section 63-9H-6 NMSA 1978 and this rule;

K. "historical access rate" means the composite per-minute intrastate switched access charge in effect for a carrier as of July 1, 2005;

L. "historical collection factor" means the ratio, for calendar year 2004, of intrastate switched access charge revenue collected by a carrier to its gross charges for intrastate switched access, except that the historical collection factor may not exceed 1.0;

M. “**imputed benchmark revenue**” means the difference between the affordability benchmark rates established by the commission pursuant to this rule and the carrier’s basic local exchange residential and business rates in effect as of July 1, 2005, multiplied by the number of basic local exchange residential and business lines served by the carrier as of December 31, 2004; imputed benchmark revenue shall not be less than zero;

N. “**interexchange carrier (IXC)**” means an entity that provides intrastate toll services in New Mexico;

O. “**intrastate retail telecommunications revenue**” means the revenue collected from the sale of intrastate telecommunications services to end users; for voice over internet protocol (VOIP) and similar services, the portion of total retail revenues attributable to intrastate retail telecommunications shall be equal to the proportion of calls originating and terminating in New Mexico to all calls originating in New Mexico;

P. “**intrastate retail telecommunications services**” means services including, but not limited to, all types of local exchange service; non-basic, vertical or discretionary services, also known as advanced features, or premium services, such as, but not limited to, call waiting, call forwarding, and caller ID; listing services; directory assistance services; cellular telephone and paging services; commercial mobile radio services; personal communications services (PCS); both optional and non-optional operator services; wide area telecommunications services (WATS) and WATS-like services; toll-free services; 900 services and other informational services; message telephone services (MTS or toll; CENTREX, Centron and centron-like services; video conferencing and teleconferencing services; the resale of intrastate telecommunications services; payphone services; services that provide telecommunications through a New Mexico telephone number using voice over internet protocol (VOIP) or comparable technologies; any services regulated by the commission; and such other services as the commission may by order designate from time to time as equivalent or similar to the services listed above, without regard to the technology used to deliver such services;

Q. “**intrastate switched access charge**” means a charge levied by a carrier for the availability and use of its facilities for origination and termination of intrastate interexchange calls as contained in tariffs approved by the commission;

R. “**local exchange carrier (LEC)**” means an entity that provides local exchange service in New Mexico;

S. “**New Mexico operations**” means intrastate retail public telecommunications services and comparable retail alternative services provided in New Mexico;

T. “**New Mexico telephone number**” means a North American numbering plan (NANP) number that provides the ability to receive calls from the public switched telephone network; and is within an area code designated to New Mexico or is a non-geographic numbering plan area (NPA) (e.g. 900) number associated with a New Mexico physical address;

U. “**rural area**” means a local exchange carrier’s study area that (1) does not include either: (a) any incorporated place of 10,000 inhabitants or more, or any part thereof, based on the most recently available population statistics of the bureau of the census; or (b) any territory, incorporated or unincorporated, included in an urbanized area as defined by the bureau of census; (2) provides telephone exchange service, including exchange access, to fewer than 50,000 access lines; (3) provides telephone exchange service to any local exchange carrier study area with fewer than 100,000 access lines; or (4) has less than 15 percent of its access lines in communities of more than 50,000;

V. “**service area**” means a geographic area established by the commission in accordance with Section 214(e)(5) of the federal act (47 U.S.C. Section 214(e)(5)).

[17.11.10.7 NMAC - Rp, 17 NMAC 13.10.7, 11/30/05; A/E, 12/28/05]

17.11.10.8 REDUCTION OF INTRASTATE SWITCHED ACCESS CHARGES:

A. Effective April 1, 2006, a local exchange carrier's intrastate switched access charges may not exceed its historical access rate, less one-third of the difference between its historical access rate and the composite interstate switched access rate based on rates approved by the federal communications commission as of January 1, 2006.

B. Effective January 1, 2007, a local exchange carrier's intrastate switched access charges may not exceed its historical access rate, less two-thirds of the difference between its historical access rate and the composite interstate switched access rate based on rates approved by the federal communications commission as of January 1, 2006.

C. Effective January 1, 2008, a local exchange carrier's intrastate switched access charges may not exceed the interstate switched access rates approved by the federal communications commission as of January 1,

2006, and its intrastate switched access elements and structure shall conform to the interstate switched access elements and structure approved by the federal communications commission.

D. A local exchange carrier may reduce its intrastate switched access charges to interstate levels and may adjust its intrastate elements and structure to conform to interstate elements and structure more rapidly than the minimum adjustments required by this section.

E. Prior to January 6, 2006, each local exchange carrier shall submit to the administrator and the commission the schedule of its intrastate access charge rate reductions in conformity with this rule and shall submit to the commission proposed tariff revisions reflecting the schedule of rate reductions and other changes necessary to assure that, upon completion of the reductions, all tariffed intrastate switched access charge elements and structure will match the tariffed interstate switched access charge elements and structure for that carrier as of January 1, 2006.

F. With respect to any local exchange carrier that opts to phase in its intrastate access charge rate reductions in conformity with the requirements of this section, any increase in its local residential and local business exchange rates toward the affordability benchmark rates and the carrier's imputed benchmark revenue shall be phased in on the same schedule as, and proportionately to, its intrastate access charge reductions.

G. The commission, on its own motion or on the motion of a party or the administrator, may order the revision of a local exchange carrier's intrastate access charge rate reduction schedule.

H. Each local exchange carrier must advise the commission in writing of the method or combination of methods that it elects and the timing of its revenue neutral recovery on or before January 6, 2006 and shall also so advise the administrator within a reasonable time following commencement of the administrator's duties; each carrier adjusting a local exchange rate pursuant to this rule shall timely file a revised tariff with the commission.

I. On or after May 1, 2008, the commission may, upon motion of a carrier or the administrator, or upon the commission's own motion, authorize further intrastate switched access charge reductions for a carrier to correspond to any changes in that carrier's tariffed interstate switched access service charge rates, elements or structure subsequent to January 1, 2006.

[17.11.10.8 NMAC - N, 11/30/05; A/E, 12/28/05]

17.11.10.9 AFFORDABILITY BENCHMARK RATES:

A. The following residential and business rates are established as initial affordability benchmark rates to be utilized in determining the level of support available from the fund:

(1) the initial residential benchmark rate shall be equal to Qwest's basic residential exchange rate after Qwest's basic residential and business local exchange rates have been increased to compensate Qwest for its revenue loss resulting from the intrastate switched access charge reductions required by this rule and the increases applied to Qwest's residential and business rates in an equal per line amount; the rate used to determine the residential benchmark shall be the flat rated residential basic local exchange rate, excluding any extended area service (EAS) rates, vertical services, toll or other additional features or services;

(2) the initial business benchmark rate shall be carrier-specific and shall be equal to the existing business basic exchange rate of each local exchange carrier plus the difference between Qwest's existing basic business basic exchange rate and Qwest's basic business basic exchange rate after Qwest's rates are increased to compensate Qwest for its revenue loss resulting from the intrastate switched access charge reductions required by this rule and the increases are applied to Qwest's business and residential lines in an equal per line amount; the rate used to determine the business benchmark rate shall be the flat rated local one-party business exchange rate, excluding EAS rates, vertical services, toll or other additional features or services; if a carrier's tariffed business rate at the time of the effective date of this rule exceeds the Qwest business rate after the increases provided above, the carrier's initial business benchmark rate shall be its tariffed business rate on that date.

(3) each Qwest residential and business line that provides the customer with a New Mexico telephone number, including lines delivered through tariffs other than the basic local exchange service tariffs, shall be counted for the purposes of calculating the per line amount of revenue required to offset Qwest's loss of switched access charge revenue.

B. The commission may conduct a proceeding to establish new affordability benchmark rates not less than every three years.

C. With respect to any local exchange carrier that chooses to phase in its decrease of intrastate access charges incrementally as permitted by 17.11.10.8 NMAC, rather than implementing the full reduction of intrastate access charges to interstate levels immediately on April 1, 2006, the imputed benchmark revenue attributable to that carrier shall be phased in at the same times, and proportionately to, the reductions in intrastate access charges.

D. Each local exchange carrier that is an ETC reducing intrastate switched access charges pursuant to this rule may offset such reductions on a revenue neutral basis, if it is in compliance with its contribution

requirements under this rule, by (1) adjusting its residential and business basic local exchange rates up to levels not exceeding the affordability benchmark rates determined by the commission, or (2) obtaining support from the fund for the difference between the affordability benchmark rates and the residential and business basic local exchange rates that would be needed to accomplish revenue neutral offsets, or (3) a combination of the two methods stated herein.

[17.11.10.9 NMAC - N, 11/30/05; A/E, 12/28/05]

17.11.10.10 SELECTION OF ADMINISTRATOR: The commission will designate a third-party administrator who will be subject to the supervision and control of the commission for a four-year term. The administrator shall perform services under the terms of a written contract to be entered into between the commission and the administrator. The commission shall procure the services of a subsequent administrator before the expiration of the term of each such contract, or in the event of early termination of such contract, as soon as practicable before or after the early termination.

A. Criteria for selection: the commission will issue a request for proposals to select the administrator; the commission shall consider whether the bidder has demonstrated the competence needed to administer the fund and the rate of compensation proposed; the commission shall also consider at a minimum whether the bidder:

- (1) is able to be neutral and impartial;
- (2) is a member of a trade association that advocates positions before this commission or other state commissions in administrative proceedings related to telecommunications issues;
- (3) is an affiliate of any contributing company;
- (4) has a substantial financial interest in any entity or affiliate that provides telecommunications services or comparable retail alternative services; and
- (5) has a board of directors that includes any member with direct financial interests in entities that contribute to or receive support from the fund in this state or any other state.

B. Termination of administrator's contract: the commission may terminate the administrator's contract with the commission before the expiration of the term of the contract upon such notice, and under such conditions, as are set forth in the contract.

[17.11.10.10 NMAC - Rp, 17 NMAC 13.10.8, 11/30/05]

17.11.10.11 EXPENDITURE AUTHORIZATION: The commission shall approve an annual budget for administration of the fund. The reasonable expenses incurred in the administration of the fund, in accordance with the terms of the contract between the commission and the administrator, shall be a cost of the fund and shall be recovered from contributions to the fund.

[17.11.10.11 NMAC - Rp, 17 NMAC 13.10.9, 11/30/05]

17.11.10.12 RESPONSIBILITIES OF ADMINISTRATOR: The administrator shall manage the day-to-day operation of the fund in accordance with this rule, applicable law, and the overall supervision and direction of the commission. The administrator shall:

- A.** fairly, consistently, and efficiently administer fund collections and disbursements in accordance with commission rules and subject to commission oversight;
- B.** establish an account or accounts in one or more independent financial institutions and ensuring that the monies deposited in the fund are insured to the maximum extent permitted by law and that they earn a return commensurate with that of state funds held on deposit in banks or other financial institutions;
- C.** ensure that the fund complies with all necessary requirements for exemption from federal, state and local taxes;
- D.** establish procedures, consistent with the commission's procedural rules and law, and with the commission's approval, for protecting the confidentiality of information submitted pursuant to this rule;
- E.** report to the commission on fund activities at least once each year; the report shall include fund collections and disbursements, administrative expenditure information, budget projections and such other information as the commission may require;
- F.** prepare an annual proposed budget for administration of the fund and submit it to the commission for review, revision, rejection or approval at such time in advance of the need for commission approval as the commission may direct, or absent such direction, at a reasonable time;
- G.** propose to the commission uniform procedures, and develop forms, to identify exempt customers, in consultation with contributing companies;

- H. create and maintain the databases necessary to administer the program and account for the funds;
 - I. develop appropriate forms for use in collecting information from contributing companies and ETCs;
 - J. pay administrative expenses out of the fund in accordance with the budget approved by the commission;
 - K. petition the commission to institute an enforcement or other action when the administrator finds that it is otherwise unable to collect amounts properly due from a contributing company under these rules, or when it appears to the administrator that any contributing company or ETC carrier is otherwise out of compliance with these rules or applicable law;
 - L. conduct, not less than once every year, such reviews as are necessary to ensure that each contributing company is making its required contributions to the fund and that support from the fund is used for the purpose of the fund.
- [17.11.10.12 NMAC - Rp, 17 NMAC 13.10.11, 11/30/05]

17.11.10.13 DISPUTE RESOLUTION: The commission may refer any disputed case between the administrator and a contributing company or between contributing companies to alternative dispute resolution if it finds that doing so would encourage the settlement of the dispute.

A. Mediation:

(1) if any of the parties or staff makes a request for mediation, the commission may, in its discretion, designate a mediator consistent with Subsection B of 17.1.2.20 NMAC;

(2) the mediator may be a permanent or temporary employee of the commission or another state agency or any other individual who is acceptable to the parties and staff; if the parties request a mediator who is not an employee of the commission, the commission shall not approve the request unless the parties agree in writing to bear as their own the costs of obtaining the mediator's services; the mediator shall not be the hearing examiner who is assigned to the case; the mediator shall have no official, financial, or personal conflict of interest with respect to the issues in controversy, unless such interest is fully disclosed in writing to all parties and staff at the time the mediator is assigned by the commission and unless all parties agree that the mediator may serve; the mediator shall not subsequent to serving as a mediator participate in the proceeding as a hearing examiner, advisory staff, staff counsel or expert witness, or as an attorney, expert witness, or representative of any party to the proceeding;

(3) the mediator may be assigned by the commission at the same time as the commission assigns the case to a hearing examiner; the mediator shall not discuss the mediation conference with any commissioner or hearing examiner hearing the case;

(4) the mediator shall notify the parties and staff by telephone or mail of the time and place of the mediation conference, which will be held at commission offices unless otherwise directed by the mediator; the notice may direct the parties and staff to send the mediator, but not other parties or staff, their settlement positions and other necessary information that could facilitate the mediation conference, including the results of staff's investigation of the complaint;

(5) if the parties are able to reach a settlement of their dispute, in appropriate cases the mediator shall assist the parties in preparing a written agreement to reflect that resolution; if the parties are unable to reach a complete settlement of their dispute, the mediator shall advise the parties that they may request arbitration or file a formal complaint with the commission;

(6) nothing shall preclude the commission from using different mediation procedures.

B. Arbitration:

(1) a party may request arbitration of any dispute; the party's request shall be in writing to the commission and shall include a concise statement of the grounds for the complaint, the remedy sought, and an acknowledgment that the party has read 17.1.2.22 NMAC and agrees to be bound by its terms;

(2) the commission or its authorized representative shall forward the request for arbitration to the other party together with a copy of Subsection A of 17.1.2.16 NMAC and 1.2.18 NMAC and require that the other party submit a written response within ten (10) days of the date of the commission's letter forwarding the request;

(3) if the responding party agrees to arbitration of the dispute, he shall include in his response to the complainant's request a concise statement of his position with regard to the merits of the complaint and an acknowledgment that he has read 17.1.2.22 NMAC and agrees to be bound by its terms; if the responding party will not agree to arbitration, he shall so state in the response;

(4) if the responding party either fails to respond to a request for arbitration or does not agree to arbitration, the initiating party retains the right to proceed with a formal complaint;

(5) if both the initiating party and the responding party agree to arbitration, the commission shall designate an arbitrator; the arbitrator may be a permanent or temporary employee of the commission or another state agency or any other individual who is acceptable to the parties to the complaint; the designated arbitrator shall have no official, financial or personal conflict of interest with respect to the issues in controversy, unless such interest is fully disclosed in writing to all parties at the time of the commission's designation and all parties agree that the arbitrator may serve; the parties shall be required to indicate their consent in writing to the designated arbitrator within ten (10) days of the date of the commission's letter of designation; if the parties request an arbitrator who is not an employee of the commission, the commission shall not approve the request unless the parties agree in writing to bear the costs as their own pursuant to Sections 8-8-4 and 62-13-3 NMSA 1978;

(6) any employee of the commission designated to arbitrate the matter under these provisions shall not participate in a subsequent proceeding on the complaint as a hearing examiner, advisory staff, staff counsel, or expert witness or as an attorney, expert witness, or representative of any party to the proceeding;

(7) the commission may assign docket numbers to arbitration proceedings for purposes of record management but the proceeding remains an informal proceeding;

(8) nothing shall preclude the commission from using different arbitration procedures.

C. Arbitration Procedures:

(1) once designated and approved by the parties, the arbitrator shall proceed to render a decision in the arbitration proceeding within sixty (60) days of the date the responding party agreed to arbitration except for good cause; if the arbitrator at any time determines that it is unlikely that the dispute can be resolved without substantially affecting the interests of other ratepayers or the public, he may so inform the parties and staff and terminate the proceeding without prejudice to the initiating party's right to file a formal complaint;

(2) the arbitrator shall fix a time and place for an informal hearing and shall serve notice of the hearing on both parties and on staff at least ten (10) days in advance of the hearing; he may issue subpoenas for the attendance of witnesses and for the production of books, records, documents, and other evidence and shall have the power to administer oaths; the parties and staff may offer such evidence and produce such additional evidence as the arbitrator may deem necessary to an understanding and determination of the dispute; the arbitrator shall decide the relevancy and materiality of the evidence offered, and conformity to the New Mexico rules of evidence or to rules of evidence contained in the commission's rules, is not necessary; no stenographic or electronic record will be made of the testimony at hearing unless requested by a party, who shall bear the cost of the record, or by staff;

(3) discovery will be permitted but only with leave of the arbitrator who shall not allow discovery which unduly complicates, burdens, or impedes the expeditious and informal nature of the proceeding;

(4) whenever the arbitrator deems it necessary to make an inspection or investigation in connection with the arbitration, he shall so advise the parties and staff, who may be present at the inspection or investigation; in the event that one or both of the parties or the staff are not present, the arbitrator shall make an oral or written report to the parties and staff and afford them an opportunity to comment;

(5) at the close of or soon after the hearing, the arbitrator will issue a brief written decision; findings of fact and conclusions of law are not necessary; the arbitrator's decision will be binding on the parties and can be implemented by the commission to the extent such implementation is necessary; however, the decision will not be a decision of the commission and shall have no precedential effect;

(6) unless agreed to by all the parties and staff, no statements, admissions, or offers of settlement made during the course of arbitration proceedings shall be admissible as evidence in any formal proceeding nor shall the arbitrator disclose the same voluntarily or through discovery or compulsory process; nothing in this section, however, shall preclude the arbitrator from issuing a brief written decision describing his conclusions and the bases for them;

(7) nothing in this rule shall be construed to mean that the commission has waived its review of any decision or that the commission consents to be bound by arbitration.

[17.11.10.13 NMAC - Rp, 17 NMAC 13.10.12, 11/30/05]

17.11.10.14 VARIANCES AND WAIVERS: Any person may petition the commission for variance or waiver of any provision of this rule for good cause shown.

A. General requirements:

(1) a contributing company or ETC may petition for an exemption or a variance from any of the requirements of this rule;

(2) such petition may include a motion that the commission stay the affected portion of this rule for the transaction specified in the motion;

(3) petitions for an exemption or a variance and motions for a stay must be supported by an affidavit signed by an officer of the contributing company or ETC or someone with authority to sign for the contributing company or ETC;

(4) the commission may, at its discretion, require an informal conference or formal evidentiary hearing prior to making its determination.

B. Contents of the petition. A petition for an exemption or variance shall:

(1) identify the section of this rule for which the exemption or variance is requested;

(2) describe the situation which necessitates the exemption or variance;

(3) describe the effect of complying with this rule on the contributing company or ETC and its customers, or on its competitive affiliates and their customers, if the exemption or variance is not granted;

(4) describe the result the request will have if granted;

(5) state how the exemption or variance will achieve the purposes of this rule and the Rural Telecommunications Act of New Mexico;

(6) state why the proposed alternative is in the public interest and is a better alternative than that provided by this rule;

(7) state why the exemption or variance would have no anticompetitive effect; and

(8) state why the requested exemption or variance would not place an undue burden on the fund.

[17.11.10.14 NMAC - Rp, 17 NMAC 13.10.13, 11/30/05]

17.11.10.15 GENERAL REPORTING REQUIREMENTS:

A. Reports require declaration: all reports filed with the commission or the administrator must be filed with a declaration from the chief financial officer of the entity or the person who prepared the reports on behalf of the entity that the information is correct and the filing is made subject to the penalty of perjury provided for in Section 30-25-1 NMSA 1978.

B. Time for reporting: where no date is specified for a report, or when a request is made by the administrator for information necessary for the administration of the fund, the administrator shall specify when the report must be filed.

C. Reporting forms: contributing companies and ETCs shall report information in the manner prescribed by the administrator. The administrator shall not require reporting that will be unduly burdensome.

D. Electronic filing: the administrator shall accept electronic reporting when practicable.

E. Confidentiality: the commission shall have access to all information reported to the administrator. Contributing companies may request that company-specific information required by the reporting requirements of this rule be treated as confidential by so indicating at the time the information is submitted. The commission shall make all decisions regarding disclosure of company-specific information and may request further information or justification from the contributing company to ensure uniformity of confidential treatment of all information submitted by contributing companies. Nothing in this rule shall preclude commission issuance of an umbrella protective order identifying what reported data shall be, or shall not be, deemed confidential. The administrator shall keep confidential all company-specific information obtained from contributing companies for which confidential treatment is requested, shall not use such information except for purposes of administering the fund, and shall not disclose such information in company-specific form unless directed to do so by the commission.

F. The commission may require the administrator to modify any of its report formats to solicit additional information necessary for the administration of the state universal service program, or to delete information that is not necessary.

[17.11.10.15 NMAC - Rp, 17 NMAC 13.10.14, 11/30/05]

17.11.10.16 REVENUE REPORTS: Each ETC and contributing company shall submit on or before April 1 of each year a revenue report on the form prescribed by the administrator detailing its intrastate retail public telecommunications revenues for the prior calendar year.

[17.11.10.15 NMAC - Rp, 17 NMAC 13.10.15, 11/30/05]

17.11.10.17 OTHER REPORTS: On or before April 1 of each year, carriers shall report the following information to the administrator in a form prescribed by the administrator, regarding facilities and activities during the preceding calendar year:

A. contributing companies, including ETCs, shall report the number and type of access lines or New Mexico telephone numbers subscribed to in total and within rural areas;

B. ETCs that are local exchange carriers shall report their number of intrastate switched access minutes;

C. contributing companies shall report the cost of collecting universal service fund (USF) surcharges, fulfilling reporting requirements, and other administrative costs of complying with this rule;

D. ETCs shall report:

(1) all revenues, compensation, payments, or subsidies received from all sources, including, but not limited to end-user customers, the state, and the federal government;

(2) all dividends or equivalents paid to shareholders, cooperative members, or others holding an ownership interest in the ETC;

(3) compensation, including value of benefits, paid to the five highest-compensated employees of the carrier;

(4) information sufficient to establish that payments from the fund were used to reduce intrastate switched access charges or to further universal service.

[17.11.10.17 NMAC - Rp, 17 NMAC 13.10.16 and 17 NMAC 13.10.17, 11/30/05]

17.11.10.18 CONTACT PERSONS: All contributing companies and ETCs shall file with the administrator the name, address, phone number and e-mail address of a contact person and shall keep the information current.

[17.11.10.18 NMAC - Rp, 17 NMAC 13.10.18, 11/30/05]

17.11.10.19 ANNUAL DETERMINATION OF FUND:

A. The administrator, or the commission, shall determine the amount of the fund for the nine-month period beginning April 1, 2006 and ending December 31, 2006 in sufficient time for contributions to be paid into and disbursements to be made from the fund. Thereafter, the administrator shall determine the amount of the fund annually, subject to commission approval, on or before October 1.

B. In the event the commission orders a change in fund support, pursuant to 17.11.10.14 or 17.11.10.25 NMAC of this rule or otherwise, that necessitates a fund size greater than that which the commission has previously established, the commission may order an adjustment to the size of the fund.

C. The amount of the fund shall be equal to the sum of each ETC's revenue requirements, calculated pursuant to this section, plus projected administrative expenses and a prudent fund balance.

D. Only carriers holding state ETC status as of October 1 shall be included in the calculation of funding requirements for the subsequent calendar year.

E. Except where the commission has established an alternative or an additional amount pursuant to 17.11.10.25 NMAC, the revenue requirement for each ETC that was eligible as of July 1, 2005 and is a local exchange carrier shall be equal to the carrier's 2004 intrastate access minutes multiplied by the difference between the allowable intrastate access rate and the carrier's historical intrastate access rate, with the product of this computation multiplied by the carrier's historical collection factor, and then reduced by the carrier's imputed benchmark revenue. The formula stated arithmetically is as follows:

$$((\text{Historical Rate Minus Allowable Rate}) \times \text{minutes} \times \text{Collection Factor}) \text{ Minus Imputed Benchmark Revenue}$$

(1) for a local exchange carrier that is an ETC in the process of incrementally phasing in its reduction of intrastate switched access charges to interstate levels as permitted by 17.11.10.8 NMAC, the "allowable rate" in the foregoing formula shall equal the composite rate or rates called for in the relevant phase or phases of that carrier's transition to interstate access charge levels;

(2) once a local exchange carrier that is an ETC has reduced its intrastate switched access charges to interstate levels, the "allowable rate" equals the interstate switched access rate;

(3) where more than one allowable rate is applicable to a given carrier in a given year, the calculation shall be done in such a way as to apply each allowable rate to the portion of the year to which it applies;

(4) in determining revenue neutrality the administrator may consider appropriate out-of-period adjustments.

F. The revenue requirement for an ETC that became an ETC after July 1, 2005 or that became an ETC prior to July 1, 2005, but is not a local exchange carrier, shall be determined annually by the administrator in conjunction with the administrator's determination of fund size, and shall be in accordance with the support rate determined by the commission pursuant to 17.11.10.23 NMAC.

[17.11.10.19 NMAC - Rp, 17 NMAC 13.10.23, 11/30/05]

17.11.10.20 DETERMINATION OF STATE USF SURCHARGE RATE AND CONTRIBUTION:

A. The administrator, or the commission, shall determine the state USF surcharge rate for the nine-month period beginning April 1, 2006 and ending December 31, 2006 is sufficient time for contributions to be paid into and disbursements to be made from the fund. Thereafter, the administrator shall determine the amount of the state USF surcharge rate annually, on or before October 1, based upon monthly and annual reports filed by ETCs and contributing companies and any other pertinent and reliable information available to the administrator or the commission.

B. Upon its determination of a USF surcharge rate, the administrator shall notify all contributing companies, ETCs, and the commission. The rate determined by the administrator shall go into effect unless modified or disapproved by the commission.

C. The surcharge rate shall be equal to the annual fund requirement divided by the sum of intrastate retail telecommunications revenue for all contributing carriers in New Mexico, and may be adjusted to account for any material deficit or surplus projected to exist at the start of the fund year.

D. Each contributing company's monthly contribution shall equal the state USF surcharge rate multiplied by its intrastate retail telecommunications revenues in New Mexico for the month.

E. If, for any month the administrator finds that the fund balance is insufficient to cover required disbursements plus administrative expenses, the administrator may, with the commission's approval, increase contribution requirements to make up the shortfall. If the fund accumulates a surplus beyond what the administrator and the commission believe is prudent under the circumstances, the administrator may, with the commission's approval, decrease contribution requirements so as to lower the fund balance to an appropriate level.

F. Each contributing company shall remit its monthly contribution to the administrator on a schedule to be determined by the administrator. Initial contributions to the fund shall be due as soon as practical, but in any event no later than May 31, 2006. The administrator may consider utilizing a portion of the balance transferred into the fund from the prior New Mexico universal service fund to support initial disbursements from the fund. The administrator shall inform the commission of its proposed schedule and any proposed use of the transferred fund balance by March 1, 2006.

[17.11.10.20 NMAC - Rp, 17 NMAC 13.10.20, 11/30/05]

17.11.10.21 RECOVERY OF CONTRIBUTIONS:

A. A contributing company shall recover the amount of its contributions to the fund from its end-user customers in a manner that is not, either by act or omission, deceptive or misleading. Such recovery shall be made in a fair, equitable and nondiscriminatory manner, and no over-recovery of contributions shall be permitted.

B. A contributing company required to provide service in accordance with commission approved tariffs shall not recover contributions from its end-user customers except as permitted under commission approved modifications to those tariffs.

C. The commission may, after notice and hearing, order modifications to a contributor's method of recovering contributions from its end-user customers.

[17.11.10.21 NMAC - Rp, 17 NMAC 13.10.21, 11/30/05]

17.11.10.22 FUND DISBURSEMENTS:

A. The administrator shall make a monthly disbursement to each ETC eligible to receive such a payment from collected revenues in the fund, on a schedule to be determined by the administrator. The administrator shall inform the commission of its proposed schedule by March 1, 2006.

B. The amount of each ETC's monthly disbursement shall be one-twelfth of its revenue requirements computed in accordance with 17.11.10.19 NMAC.

C. Only carriers holding ETC status as of October 1 shall be eligible to receive disbursements from the fund during the year that begins the following January 1.

D. The administrator shall not pay, and shall hold in escrow, any disbursements otherwise due to an ETC that is also a contributing company, if that company shall not be in compliance with its contribution requirements.

E. If, for any month, the fund balance is insufficient to meet the sum of all ETCs' revenue requirements plus administrative expenses and maintain a prudent fund balance, the administrator shall prorate payments to each ETC, and, if indicated, shall propose an increase in the surcharge rate in accordance with Subsection E of 17.11.10.20 NMAC. Any reductions in payments to ETCs resulting from prorated disbursements shall be paid out at such time as sufficient monies have been paid into the fund.

[17.11.10.22 NMAC - N, 11/30/05]

17.11.10.23 DESIGNATION OF ETCs:

A. Any carrier operating in New Mexico and designated as a state ETC as of July 1, 2005 and which has not lost that designation is automatically designated as an ETC for the purposes of this rule. If at any subsequent time a carrier loses ETC designation status, it shall no longer be eligible to receive support from the fund.

B. Other carriers may file a petition for designation as an ETC in accordance with 17.11.10.24 NMAC.

C. On its own motion or in response to a petition, the commission may, after notice and hearing and for good cause shown, modify, suspend, or revoke an ETC designation.

D. Upon approval of a carrier for ETC status under these rules, the commission shall establish the carrier's support rate. In determining a just and reasonable support rate for an ETC, the commission shall:

(1) consider the cost of efficiently providing services to the proposed service area, including a rate of return determined by the commission to be reasonable, using the most cost-effective technologies, but also taking into consideration existing infrastructure;

(2) consider the amount of support available to the ETC through the federal universal service funds;

(3) ensure that the support rate for a competitive carrier not exceed the equivalent support received through these rules by the incumbent carrier or carriers serving the proposed service area.

E. On its own motion or in response to a petition, the commission may modify an ETC's support rate to reflect more current cost information or changes in service volumes.

[17.11.10.23 NMAC - Rp, 11/30/05]

17.11.10.24 PETITIONS FOR ETC DESIGNATION AND SUPPORT RATES:

A. Any entity seeking designation as a state or federal ETC, or an existing ETC that is not an incumbent local exchange carrier which may receive support from the fund to achieve revenue neutrality in connection with its reductions in intrastate switched access rates and seeks support from the fund must file a petition with the commission. In the case of a petition for ETC designation and support rate, the petition shall:

(1) include a description of the proposed service area for which it seeks designation that is consistent with the federal requirements relating to service areas set forth in, 47 C.F.R. Section 54.207;

(2) demonstrate that the entity meets the requirements in Section 214(e) of the federal act (47 U.S.C. Section 214(e)) to be designated as a federal ETC;

(3) demonstrate that the proposed designation is in the public interest;

(4) include financial and statistical information sufficient for the commission to establish an initial support rate;

(5) provide a five-year plan demonstrating how support from the fund will be used to improve the petitioner's coverage, service quality or capacity throughout the service area for which it seeks designation;

(6) demonstrate the petitioner's ability to remain functional in emergency situations;

(7) demonstrate that the petitioner will satisfy consumer protection and service quality standards;

(8) offer local usage plans comparable to those offered by incumbent local exchange carriers in the areas for which the petitioner seeks designation;

(9) acknowledge that the petitioner may be required to provide equal access if all other ETCs in the designated area relinquish their designations;

(10) demonstrate that granting ETC status to the petitioner in the designated area is likely to result in more customer choice;

(11) address the impact of designation of the petitioner on the size of the fund;

(12) address the unique advantages and disadvantages of the petitioner's service offering;

(13) demonstrate the petitioner's willingness and ability to offer service throughout the designated service area within a reasonable time frame; and

(14) provide such other information as the commission or the administrator may find appropriate.

B. A petition by an existing ETC for a support rate shall demonstrate that granting the proposed support rate is in the public interest and shall include financial and statistical information sufficient for the commission to establish a support rate; a precise description of how the petitioner intends to use support it receives from the fund; and such other information as the commission or the administrator may find appropriate.

C. Consideration of the public interest will apply in all ETC designation and support rate proceedings. The commission is not required to designate additional ETCs in any service area, if not in the public interest.

D. The commission shall, after such notice and hearing as the commission shall prescribe, enter its written order approving or denying a company's petition. An order approving a petition for ETC designation shall

specify the service area for which designation is made and an order approving either a petition for ETC designation or a petition for a support rate shall state the approved support rate.

E. The commission may approve a petition for designation as a federal ETC in conjunction with a petition for designation as a state ETC.

F. The commission shall require annual verification from each ETC that it continues to meet the requirements herein for designation as an ETC and for provision of support from the fund.
[17.11.10.24 NMAC - Rp, 17 NMAC 13.10.27, 11/30/05]

17.11.10.25 PETITION FOR ADDITIONAL SUPPORT:

A. An ETC may petition the commission for support from the fund at a level greater than that provided for by Subsection C of 17.11.10.19 NMAC, when such an adjustment is necessary to ensure the availability of local telecommunications services at affordable rates in the state.

B. In a rate proceeding filed pursuant to Subsection F of Section 63-9H-7 NMSA 1978, an incumbent rural local exchange carrier may obtain additional support if the commission determines that payments should be authorized from the fund in order to ensure the widespread availability and affordability of rural residential local exchange services.

C. An ETC or incumbent carrier petitioning for support from the fund under this section shall submit historic and prospective information on its costs of providing services and shall demonstrate that it is providing services in the most prudent manner possible.

[17.11.10.25 NMAC - N, 11/30/05]

17.11.10.26 COMPLIANCE WITH CONTRIBUTION REQUIREMENTS:

A. If the administrator finds that a contributing company has not contributed the amount required by this rule, the administrator shall notify the contributing company in writing. The administrator shall request the company to pay the deficiency in its contribution.

B. The contributing company shall pay the requested amount within twenty-one (21) days of the date of the notice or seek dispute resolution as provided in this rule.

C. If attempts by the administrator to collect the total requested amount from a contributing company or to resolve a dispute are unsuccessful, the administrator shall notify the commission in writing.

D. Upon request by the administrator, a complaint filed by an interested party, or its own motion, the commission, after providing notice and an opportunity for a hearing in accordance with 17.1.2 NMAC, may issue an order requiring a contributing company to pay any arrearage in contributions that the commission finds to exist and may also impose interest, a fine or other appropriate administrative penalties or requirements or bonding to assure future compliance with contribution requirements. In the event that a contributing company fails or refuses to comply with a commission order issued pursuant to this provision, the commission may petition the appropriate district court for appropriate injunctive relief and for enforcement of the commission's order.

E. The commission may take the same types of action set forth in Subsection D of 17.11.10.26 NMAC in the event that it finds, after a proceeding of the type specified in Subsection D of 17.11.10.26 NMAC, that a contributing company or an ETC has, in any other way, violated any provision of this rule or of the rural telecommunications act of New Mexico, Sections 63-9H-1 et seq. NMSA 1978.

[17.11.10.26 NMAC - Rp, 17 NMAC 13.10.31, 11/30/05]

17.11.10.27 USE OF FUND SUPPORT:

A. An ETC shall use fund support in a manner consistent with the rural telecommunications act, Sections 63-9H-1 et seq. NMSA 1978, Section 254 of the federal telecommunications act (47 U.S.C. 254), and commission rules and orders. Fund support must be used to preserve and advance universal service, that is, to provide, at reasonable and affordable rates, access by consumers in all regions, including low-income consumers and those in rural, insular and high cost areas, to quality telecommunications and information services, including interexchange services and advanced telecommunications and information services that are reasonably comparable to services provided in other areas.

B. If the commission finds, in a proceeding on its own motion or on the motion of the administrator or an interested party, that an ETC has used fund support for purposes other than to preserve and advance universal service, the commission may impose an appropriate administrative remedy, which may include, but need not be limited to, ordering the ETC to refund amounts paid to it from the fund.

[17.11.10.27 NMAC - Rp, 17 NMAC 13.10.32, 11/30/05]

17.11.10.28 ACCESS TO BOOKS, RECORDS AND PROPERTY:

A. The administrator or the commission shall have access to the books of account, records and property of all contributing companies and ETCs to the extent necessary to verify information reported or required to be reported pursuant to this rule. The administrator or commission may direct a contributing company or ETC to send copies of records to the administrator or commission or may inspect records at the offices of the contributing company or ETC, at the administrator's or commission's discretion.

B. In the normal course of business, the administrator will give at least three (3) days notice of its plans to inspect records in the offices of a contributing companies or ETC. The administrator may apply to the commission to procure a subpoena in order to inspect records without notice.

[17.11.10.28 NMAC - Rp, 17 NMAC 13.10.33, 11/30/05]

17.11.10.29 REVIEW AND AUDIT OF ADMINISTRATOR AND FUND: For each year beginning with 2006, the administrator shall provide the commission with a financial statement of the fund and the administration of the fund by February 15. The commission shall engage a qualified independent auditor to audit each such financial statement and to submit a written opinion to the commission.

[17.11.10.29 NMAC - Rp, 17 NMAC 13.10.34, 11/30/05]

17.11.10.30 ADVISORY BOARD:

A. The commission shall establish and appoint an advisory board composed of representatives from participating contributing companies and ETCs, the attorney general, the commission staff, and any representative(s) of one or more consumer groups or organizations that the commission may choose to appoint. The members shall include no more than one representative from each of the following types of telecommunications carriers and entities providing comparable intrastate retail services: rural incumbent telecommunications carriers; incumbent local exchange carriers other than incumbent rural telecommunications carriers; interexchange carriers; competitive local exchange carriers not ETC-designated; ETC-designated competitive local exchange carriers; commercial mobile radio service providers not-ETC-designated; and ETC-designated commercial mobile radio service providers. Any other type of telecommunications carriers or providers of comparable intrastate retail service may petition the commission for representation by no more than one member of that type of carrier or service provider on the advisory board, which the commission may grant by order. The commission shall resolve any dispute among the carriers or service providers of each type as to who shall be the member of the advisory board. The members representing participating contributors shall each be appointed for a term of three (3) years. Expenses incurred by a member in connection with participation on the advisory board shall not be reimbursed from the fund.

B. The advisory board shall meet periodically with the administrator and shall provide advice and consultation to the administrator as provided under this rule. Where deemed necessary by the advisory board, it shall make recommendations to the commission or the administrator, or both, relating to potential matters related to administration of the fund. Should the members of the advisory board not agree on a recommendation to the commission or administrator on any particular matter, the advisory board may provide a majority recommendation as well as a minority recommendation as to the resolution of any such identified issue. In addition, any member of the advisory board may, with advance written notice to the other members of the advisory board, provide individual recommendations or other information to the commission and the administrator that it deems appropriate. The advisory board is intended to be a forum within which to build consensus on matters relating to the administration of the fund, while not deterring any interested party from communicating its concerns relating to the administration of the fund to the advisory board, or, subject to advance written notice to the other members of the advisory board, directly to the commission.

[17.11.10.30 NMAC - Rp, 17 NMAC 13.10.10, 11/30/05]

17.11.10.31 EMERGENCY AMENDMENTS: The commission finds that the amendments to this rule consisting of: (A) in Subsection M of Section 17.11.10.7 NMAC adding the words "local exchange" after the words "the carrier's basic, adding the words "basic local exchange" following the words "multiplied by the number of", and striking the words "with the number of business lines to include each line providing the customer with a New Mexico telephone number, including lines delivered through tariffs other than the basic business local exchange service tariff" following the words "as of December 31, 2004;" (B) at the end of Subsection F of 17.11.10.8 NMAC, deleting the words "except as provided for in Subsection E 17.11.10.9 NMAC of this rule;" (C) in Subsection A (2) of Section 17.11.10.9 NMAC, deleting the words "equal to Qwest's basic business exchange rate increased to compensate Qwest for that portion of its revenue loss resulting from the intrastate switched access charge reductions required by this rule and the increases applied to Qwest's residential and business rates in an equal per line amount"

and adding in their place the words "carrier-specific and shall be equal to the existing business basic exchange rate of each local exchange carrier plus the difference between Qwest's existing basic business basic exchange rate and Qwest's basic business basic exchange rate after Qwest's rates are increased to compensate Qwest for its revenue loss resulting from the intrastate switched access charge reductions required by this rule and the increases are applied to Qwest's business and residential lines in an equal per line amount;" (D) at the end of Subsection A (2) of Section 17.11.10.9 NMAC, adding the words "if a carrier's tariffed business rate at the time of the effective date of this rule exceeds the Qwest business rate after the increases provided above, the carrier's initial business benchmark rate shall be its tariffed business rate on that date;" (5) at the end of Subsection C of 17.11.10.9 NMAC deleting the words "except as provided for in Subsection E of 17.11.10.9 NMAC of this rule;" (E) in Subsection D of 17.11.10.9 NMAC adding the word "local" following the words "adjusting its residential and business basic" and adding the word "local" following the words "and the residential and business basic;" and (F) deleting the entirety of Subsection E of 17.11.10.9 NMAC require immediate adoption for the preservation of the general welfare and therefore constitute an emergency amendment to this rule within the meaning of NMSA 1978, Section 8-8-15.C and 1.24.1.7 I NMAC. Specifically, the commission finds that failure to implement the changes immediately would severely impair the ability of the commission, the administrator and contributing companies to (a) correctly determine business benchmark rates (b) correctly determine revenue requirements from the fund due to ETCs; (c) correctly determine the size of the fund; (d) correctly determine contributions to the fund due from contributing companies; and (e) comply with the requirement of NMSA 1978, Section 63-9H-6.C that intrastate access charge reductions be revenue neutral by the deadlines set Subsection E and Subsection H of 17.11.10.8 NMAC and NMSA 1978, Section 63-9H-6.I.

[17.11.10.31 NMAC - N/E, 12/28/05]

HISTORY OF 17.11.10 NMAC: [RESERVED]

Pre-NMAC History: None.

History of Repealed Material:

17 NMAC 13.10, State Rural Universal Service Fund (filed 12/15/1999) repealed 11/30/05.

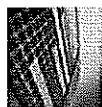
Other History:

17 NMAC 13.10, State Rural Universal Service Fund (filed 12/15/1999) was replaced by 17.11.10 NMAC, State Rural Universal Service Fund, effective 11/30/05.

ATTACHMENT C

U.S. Census Bureau

American FactFinder



United States -- States; and Puerto Rico
GCT-PH1-R. Population, Housing Units, Area, and Density (geographies
ranked by total population): 2000
Data Set: Census 2000 Summary File 1 (SF 1) 100-Percent Data

NOTE: For information on confidentiality protection, nonsampling error, definitions, and count corrections see
<http://factfinder.census.gov/home/en/datanotes/expsf1u.htm>.

Rank	Geographic area	Population	Housing units	Area in square miles			Density per square mile of land area	
				Total area	Water area	Land area	Population	Housing units
	United States	281,421,906	115,904,641	3,794,083.06	256,644.62	3,537,438.44	79.6	32.8
1	California	33,871,648	12,214,549	163,695.57	7,736.23	155,959.34	217.2	78.3
2	Texas	20,851,820	8,157,575	268,580.82	6,783.70	261,797.12	79.6	31.2
3	New York	18,976,457	7,679,307	54,556.00	7,342.22	47,213.79	401.9	162.6
4	Florida	15,982,378	7,302,947	65,754.59	11,827.77	53,926.82	298.4	135.4
5	Illinois	12,419,293	4,885,615	57,914.38	2,330.79	55,583.58	223.4	87.9
6	Pennsylvania	12,281,054	5,249,750	46,055.24	1,238.63	44,816.61	274.0	117.1
7	Ohio	11,353,140	4,783,051	44,824.90	3,876.53	40,948.38	277.3	116.8
8	Michigan	9,938,444	4,234,279	96,716.11	39,912.28	56,803.82	175.0	74.5
9	New Jersey	8,414,350	3,310,275	8,721.30	1,303.96	7,417.34	1,134.4	446.3
10	Georgia	8,186,453	3,281,737	59,424.77	1,518.63	57,906.14	141.4	56.7
11	North Carolina	8,049,313	3,523,944	53,818.51	5,107.63	48,710.88	165.2	72.3
12	Virginia	7,078,515	2,904,192	42,774.20	3,180.13	39,594.07	178.8	73.3
13	Massachusetts	6,349,097	2,621,989	10,554.57	2,714.55	7,840.02	809.8	334.4
14	Indiana	6,080,485	2,532,319	36,417.73	550.83	35,866.90	169.5	70.6
15	Washington	5,894,121	2,451,075	71,299.64	4,755.58	66,544.06	88.6	36.8
16	Tennessee	5,689,283	2,439,443	42,143.27	926.15	41,217.12	138.0	59.2
17	Missouri	5,595,211	2,442,017	69,704.31	818.39	68,885.93	81.2	35.5
18	Wisconsin	5,363,675	2,321,144	65,497.82	11,187.72	54,310.10	98.8	42.7
19	Maryland	5,298,486	2,145,283	12,406.68	2,632.86	9,773.82	541.9	219.5
20	Arizona	5,130,632	2,189,189	113,998.30	363.73	113,634.57	45.2	19.3
21	Minnesota	4,919,479	2,065,946	86,938.87	7,328.79	79,610.08	61.8	26.0
22	Louisiana	4,468,976	1,847,181	51,839.70	8,277.85	43,561.85	102.6	42.4
23	Alabama	4,447,100	1,963,711	52,419.02	1,675.01	50,744.00	87.6	38.7
24	Colorado	4,301,281	1,808,037	104,093.57	376.04	103,717.53	41.5	17.4
25	Kentucky	4,041,769	1,750,927	40,409.02	680.85	39,728.18	101.7	44.1
26	South Carolina	4,012,012	1,753,670	32,020.20	1,910.73	30,109.47	133.2	58.2
27	Oklahoma	3,450,654	1,514,400	69,898.19	1,231.13	68,667.06	50.3	22.1
28	Oregon	3,421,399	1,452,709	98,380.64	2,383.85	95,996.79	35.6	15.1
29	Connecticut	3,405,565	1,385,975	5,543.33	698.53	4,844.80	702.9	286.1
30	Iowa	2,926,324	1,232,511	56,271.55	402.20	55,869.36	52.4	22.1
31	Mississippi	2,844,658	1,181,953	48,430.19	1,523.24	46,906.96	60.6	24.8
32	Kansas	2,688,418	1,131,200	82,276.84	461.96	81,814.88	32.9	13.8
33	Arkansas	2,673,400	1,173,043	53,178.62	1,110.45	52,068.17	51.3	22.5
34	Utah	2,233,169	768,594	84,898.83	2,755.18	82,143.65	27.2	9.4
35	Nevada	1,998,257	827,457	110,560.71	734.71	109,825.99	18.2	7.5
36	New Mexico	1,819,046	780,579	121,589.48	233.96	121,355.53	15.0	6.4
37	West Virginia	1,808,344	844,623	24,229.76	162.03	24,077.73	75.1	35.1
38	Nebraska	1,711,263	722,668	77,353.73	481.31	76,872.41	22.3	9.4
39	Idaho	1,293,953	527,824	83,570.08	822.87	82,747.21	15.6	6.4
40	Maine	1,274,923	651,901	35,384.66	4,523.10	30,861.55	41.3	21.1
41	New Hampshire	1,235,786	547,024	9,349.94	381.84	8,968.10	137.8	61.0
42	Hawaii	1,211,537	460,542	10,930.98	4,508.36	6,422.62	188.6	71.7
43	Rhode Island	1,048,319	439,837	1,545.05	500.12	1,044.93	1,003.2	420.9
44	Montana	902,195	412,633	147,042.40	1,489.96	145,552.43	6.2	2.8
45	Delaware	783,600	343,072	2,489.27	535.71	1,953.56	401.1	175.6
46	South Dakota	754,844	323,208	77,116.49	1,231.85	75,884.64	9.9	4.3
47	North Dakota	642,200	289,677	70,699.79	1,723.86	68,975.93	9.3	4.2
48	Alaska	626,932	260,978	663,267.26	91,316.00	571,951.26	1.1	0.5
49	Vermont	608,827	294,382	9,614.26	364.70	9,249.56	65.8	31.8
50	District of Columbia	572,059	274,845	68.34	6.94	61.40	9,316.4	4,476.1
51	Wyoming	493,782	223,854	97,813.56	713.16	97,100.40	5.1	2.3
	Puerto Rico	3,808,610	1,418,476	5,324.50	1,899.94	3,424.56	1,112.1	414.2

(X) Not applicable

Source: U.S. Census Bureau, Census 2000 Summary File 1

ATTACHMENT D

From: Edelson, Deborah [mailto:Devorah.Edelson@wolterskluwer.com]
Sent: Friday, August 07, 2009 8:59 AM
To: Smith, Ken, PRC
Subject: FW: NM USF question

Good morning,

When can I expect a response to the question below?

Thanks!

Devorah Edelson
Information Support Services
CCH, a Wolters Kluwer business
Phone: (732) 363-0724
Fax: (845) 426-6275
Email: devorah.edelson@wolterskluwer.com

From: Edelson, Deborah
Sent: Monday, August 03, 2009 10:22 AM
To: 'Smith, Ken, PRC'
Subject: NM USF question

Good morning,

I have the following questions concerning the New Mexico Universal Service Fund:

In the recently issued Federal district court decision in *New Mexico Public Regulation Commission v. Vonage Holdings Corp.*, Case 08-CV00607, the Federal District court dismissed the lawsuit filed by the New Mexico Public Regulation Commission which was seeking to obtain a declaratory judgment that Vonage is subject to the New Mexico Universal Service Fund ("NM USF"). The Federal district court determined that federal law preempts state regulators from imposing surcharges on providers like Vonage.

My specific questions are:

- 1) Is the New Mexico Public Regulation Commission planning to appeal this decision?
- 2) In light of this opinion, are VOIP providers now exempt from the NM USF (at least pending any final decision on appeal of this case)?

Thank you for your assistance!

Sincerely,

Devorah Edelson
Information Support Services
CCH, a Wolters Kluwer business
Phone: (732) 363-0724
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Email: devorah.edelson@wolterskluwer.com

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